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125th MAINE LEGISLATURE
FIRST REGULAR SESSION – 2011

Governor's Proposed Amendment to LD 1, An Act To
Ensure Regulatory Fairness and Reform

Jobs Impact Analysis

5 M.R.S.A. § _____ is enacted to read:

All departments and agencies are required to prepare and publish a Jobs Impact Analysis for every new rule proposed and to publish it at the time such new rule is posted for rulemaking. A Jobs Impact Analysis shall evaluate the potential impact of the proposed rule on jobs and employment opportunities.

(a) The Jobs Impact Analysis shall be a statement from the department or agency describing whether the rule will have a substantial adverse impact, will have no impact, or will have a positive impact upon jobs and employment opportunities. The department or agency shall include in this statement a summary of the information and methodology underlying the basis for its determination.

(b) Where it has been determined by the department or agency that the rule may have a substantial adverse impact on jobs or employment opportunities, the Jobs Impact Analysis issued by the department or agency shall include a Jobs Impact Statement that describes:

- (i) the nature of the impact the rule will have on jobs and employment opportunities;
- (ii) the categories of jobs or employment opportunities affected by the rule;
- (iii) the approximate number of jobs or employment opportunities affected in each category;
- (iv) any region of the state where the rule would have a disproportionate adverse impact on jobs or employment opportunities; and
- (v) any measures that the department or agency has taken to minimize any unnecessary adverse impacts on existing jobs and to promote the development of new employment opportunities.

Fiscal Impact.

5 M.R.S.A. §8063, is amended to read:

Every rule proposed by an agency must contain a fiscal impact note at the end of the rule. The note must be placed on the rule prior to any public hearing and, in the case of rules adopted without a hearing, prior to the sending of notice under section 8053. The fiscal impact note must describe the estimated cost to municipalities and counties for implementing or complying with the proposed rule. If the proposed rule will not impose any cost on municipalities or counties, the fiscal impact note must state that fact. No rule may be adopted if the rule proposal fails to include a fiscal impact note; any such rule purported to be adopted shall be void *ab initio*.

Small Business Ombudsman.

5 M.R.S.A. § _____ is enacted to read:

The Office of the Small Business Ombudsman shall be created within the Department of Economic and Community Development. The Small Business Ombudsman shall be appointed by the Governor. The person who is appointed to serve as the Ombudsman shall be experienced in management and in working with private enterprise and government entities, knowledgeable in the areas of arbitration and negotiation, experienced in interpreting statutory and regulatory law, and knowledgeable in investigation techniques and procedures, recordkeeping, and report writing. The duties of the Ombudsman shall include assisting businesses with understanding current or proposed regulations and compliance issues; mediation in resolving complaints or disputes; and, representing business concerns regarding potentially unreasonable or unfair state regulatory actions, such as investigations, excessive fines, penalties, threats, or other enforcement action by a state department or agency.

Judicial review of Agency Decisions

5 MRSA § 8058(1), as last amended by P.L. 1985, c. 680, is amended to read:

Judicial review of an agency rule, or of an agency's refusal or failure to adopt a rule where the adoption of a rule is required by law, may be had by any person who is aggrieved in an action for declaratory judgment in the Superior Court conducted pursuant to Title 14, section 5951, et seq., which provisions shall apply to such actions wherever not inconsistent with this section. Insofar as the court finds that a rule exceeds the rule-making authority of the agency, or is void under section 8057, subsection 1 or 2, it shall declare the rule invalid. In reviewing any

other procedural error alleged, the court may invalidate the rule only if it finds the error to be substantial ~~and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if the error had not occurred.~~ If the court finds that the rule is not procedurally invalid and not in excess of the agency's rule-making authority, its substantive review of that rule shall be to determine whether the rule is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The court, in review of a rule, shall give only limited deference to the agency's interpretation of applicable statutes to the rulemaking. The phrase "otherwise not in accordance with law" shall apply only to the review authorized in the preceding sentence and shall not be construed so as to limit or replace in any way section 8003. In the event that the court finds that an agency has failed to adopt a rule as required by law, the court may issue such orders as are necessary and appropriate to remedy such failure.

5 MRSA § 9061, as enacted by P.L. 1977, c. 551, is amended to read:

§ 9061. Decisions

Every agency decision made at the conclusion of an adjudicatory proceeding shall be in writing or stated in the record, and shall include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision. A copy of the decision shall be delivered or promptly mailed to each party to the proceeding or his representative of record. Written notice of the party's rights to review or appeal of the decision within the agency or review of the decision by the courts, as the case may be, and of the action required and the time within which such action must be taken in order to exercise the right of review or appeal, shall be given to each party with the decision. ~~If a~~Any review or appeal of a decision to any court of this state shall require that the court, while considering the underlying decision appealed, shall give only limited deference to any such decision, and limited deference to the agency's interpretation of any applicable statutes.

The agency shall maintain a record of the vote of each member of the agency with respect to the agency decision.

5 MRSA § 11007(4)(C)(5), as enacted by P.L. 1977, c. 551, is amended to read:

- C. Reverse or modify the decision if the administrative findings, inferences, conclusions or decisions are:
- (1) In violation of constitutional or statutory provisions;
 - (2) In excess of the statutory authority of the agency;
 - (3) Made upon unlawful procedure;
 - (4) Affected by bias or error of law;
 - (5) Unsupported by ~~substantial~~ a preponderance of evidence on the whole record; or
 - (6) Arbitrary or capricious or characterized by abuse of discretion.

Repeal of the Maine Informed Growth Act

30-A M.R.S.A. Part 2, subpart 6-A, chapter 187, subchapter 3-A is repealed.

Replace the Board of Environmental Protection with a Board of Environmental Appeals and to Reallocate Certain Responsibilities of the BEP and the DEP

§341-A. Department of Environmental Protection

There is established a Department of Environmental Protection, in this Title called the "department."

1. Purpose. The department shall prevent, abate and control the pollution of the air, water and land and preserve, improve and prevent diminution of the natural environment of the State. The department shall protect and enhance the public's right to use and enjoy the State's natural resources and may educate the public on natural resource use, requirements and issues.

2. Composition. The department shall ~~consist of the Board of Environmental Protection, in the laws administered by the department called "board," and of~~ be directed by a Commissioner of Environmental Protection, in the laws administered by the department called "commissioner," and shall consist of a Bureau of Remediation and Waste Management, a Bureau of Air Quality Control, and a Bureau of Land and Water Quality. There shall also be a Board of Environmental Appeals, in the laws administered by the department called "board," which shall be independent from the commissioner.

3. Commissioner. The commissioner is appointed by the Governor, subject to review by the joint standing committee of the Legislature having jurisdiction over natural resource matters and to confirmation by the Legislature.

A. The commissioner serves at the pleasure of the Governor.

B. When the State receives authority to issue permits under the Federal Water Pollution Control Act, 33 United States Code 1982, Section 1251 et seq., as amended, a person may not serve as commissioner who receives, or during the 2 years prior to appointment has received, a significant portion of income directly or indirectly from license or permit holders or applicants for a license or permit under the Federal Water Pollution Control Act. For the purposes of this section, "a significant portion of income" means 10% or more of gross personal income for a calendar year, except that it means 50% or more if the recipient is over 60 years of age and is receiving that portion under retirement, pension or similar arrangement.

C. The commissioner may delegate duties assigned to the commissioner under this Title to staff of the department.

4. Licenses and permits. For purposes of this Title, all licenses or permits shall be issued by the department ~~may be issued by either the commissioner or the board subject to the provisions of section 341-D, subsection 2.~~

§341-B. Purpose of the board

The purpose of the Board of Environmental Appeals ~~Protection~~ is to provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws relating to environmental protection and to provide for credible, fair and responsible public participation in department decisions. The board shall fulfill its purpose through rulemaking, decisions on selected permit applications, review of the commissioner's licensing and enforcement actions and recommending changes in the law to the Legislature. hear appeals of enforcement actions brought by the department following filing of an administrative complaint or issuance of an administrative order, to consider and approve, as appropriate, administrative consent agreements entered into by the department following issuance of an administrative complaint, and to hear appeals of permits issued by the department.

§341-C. Board membership

Membership of the Board of Environmental ~~Protection~~ Appeals is governed by this section.

1. Appointments. The board consists of ~~10 members~~ 3 administrative law judges appointed by the Governor, ~~subject to review by the joint standing committee of the Legislature having jurisdiction over natural resource matters and to confirmation by the Legislature.~~

2. Qualifications and requirements. Members of the board must be admitted to the practice of law in the State and registered with the Board of Overseers of the Bar or be a retired judge of the District Court or Superior Court. Members of the board shall devote full time to their judicial duties. During their term of office, a member of the board shall not practice law, nor shall a member of the board be the partner or associate of any person in the practice of law, chosen to represent the broadest possible interest and experience that can be brought to bear on the administration and implementation of this Title and all other laws the board is charged with administering. At least 4 members must be residents of the First Congressional District and at least 4 members must be residents of the Second Congressional District. The boundaries of the congressional districts are defined in Title 21-A, chapter 15. A county commissioner, county employee, municipal official or municipal employee is not considered to hold an incompatible office for purposes of simultaneous service on the board. If a county or municipality is a participant in an adjudicatory proceeding before the board, a commissioner, official or employee from that county or municipality may not participate in that proceeding.

3. Terms. The initial appointments to the board shall be one member each for a two year term, a three year term and a four year term. Thereafter, the members must be appointed for staggered 4-year terms, except that a vacancy must be filled for the unexpired portion of the any term. A member may not serve more than 2 consecutive 4 year terms.

4. ~~Chair~~ Chief Judge. The Governor shall appoint one judge member to serve as ~~chair~~ chief judge.

5. Expired terms. Any member who has not been renominated by the Governor within 90 days of the expiration of that member's term may not continue to serve on the board unless the Governor notifies the Legislature, in writing and within 90 days of the expiration of that member's term, that extension of the member's term is required to ensure fair consideration of specific major applications-proceedings pending before the board. That member's term terminates upon final board actions on the specific applications-proceedings identified in the Governor's communication.

6. Compensation. Members are entitled to compensation ~~according to the provisions of in~~ accordance with the compensation paid to Associate Judges of the District Court, Title 54, section 12004-D157(4).

7. Conflict of interest. Members are governed by the conflict of interest provisions of Title 5, section 18. If a member believes that a conflict of interest may require that member's abstention in a proceeding, unless the member in question objects, the question of the conflict of interest must be submitted to a nonbinding advisory vote of the members present, excluding the member in question.

8. Federal Water Pollution Control Act requirements. When the State receives authority to grant permits under the Federal Water Pollution Control Act, 33 United States Code 1982, Section 1251 et seq., as amended, a person may not serve as a board member who receives, or during the 2 years prior to appointment has received, a significant portion of income directly or indirectly from license or permit holders or applicants for a license or permit under the Federal Water Pollution Control Act. For the purposes of this section, "a significant portion of income" means 10% or more of gross personal income for a calendar year, except that it means 50% or more if the recipient is over 60 years of age and is receiving that portion under retirement, pension or similar arrangement.

§341-D. Board responsibilities and duties

The board is charged with the following duties and responsibilities.

1. Rulemaking.

1-A. Rulemaking.

1-B. Rulemaking. Subject to the Maine Administrative Procedure Act, the ~~board-department~~ shall ~~propose, adopt, amend or repeal procedural and administrative reasonable rules and emergency rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering. The board shall also adopt, amend and repeal rules necessary for the conduct of its business.~~

~~The department shall identify in its regulatory agenda, when feasible, a proposed rule or provision of a proposed rule that is anticipated to be more stringent than the federal standard, if an applicable federal standard exists.~~

~~During the consideration of any proposed rule by the board, when feasible, and using information available to it, the department shall identify provisions of the proposed rule that the~~

department believes would impose a regulatory burden more stringent than the burden imposed by the federal standard, if such a federal standard exists, and shall explain in a separate section of the basis statement the justification for the difference between the agency rule and the federal standard.

Notwithstanding Title 5, chapter 375, subchapter II, the board shall accept and consider additional public comment on a proposed rule following the close of the formal rule-making comment period at a meeting that is not a public hearing only if the additional public comment is directly related to comments received during the formal rule-making comment period or is in response to changes to the proposed rule. Public notice of the meeting must comply with Title 1, section 406 and state that the board will accept additional public comment on the proposed rule at that meeting.

This subsection takes effect January 1, 1998.

2. Permit and license applications. Except as otherwise provided in this subsection, the board shall decide each application for approval of permits and licenses that in its judgment:

- A. Involves a policy, rule or law that the board has not previously interpreted;
- B. Involves important policy questions that the board has not resolved;
- C. Involves important policy questions or interpretations of a rule or law that require reexamination; or
- D. Has generated substantial public interest

The board shall assume jurisdiction over applications referred to it under section 344, subsection 2-A, when it finds that the criteria of this subsection have been met.

The board may vote to assume jurisdiction of an application if it finds that one or more of the criteria in this subsection have been met.

Any interested party may request the board to assume jurisdiction of an application.

The board may not assume jurisdiction over an application for an expedited wind energy development as defined in Title 35-A, section 3451, subsection 4, for a certification pursuant to Title 35-A, section 3456 or for a general permit pursuant to section 480-HH or section 636-A.

3. Modification, revocation or suspension. After written notice to the licensee by the department and opportunity for a hearing before the board pursuant to the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV, and procedural rules adopted by the board, the board may modify in whole or in part any license, or may issue an order prescribing necessary corrective action, or may act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license, whenever the board finds by a preponderance of the evidence that:

- A. The licensee has violated any condition of the license;

- B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts; [1989, c. 890, Pt. A, §13 (NEW);
- C. The licensed discharge or activity poses a threat to human health or the environment;
- D. The license fails to include any standard or limitation legally required on the date of issuance;
- E. There has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license;
- F. The licensee has violated any law administered by the department; or
- G. The license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990.

For the purposes of this subsection, the term "license" includes any license, permit, order, approval or certification issued by the department and the term "licensee" means the holder of the license.

4. Appeal or review. The board shall review, may hold a hearing at its discretion on and may affirm, amend-, reverse or remand to the commissioner for further proceedings any of the following:

A. Final license or permit decisions made by the commissioner when a person aggrieved by a decision of the commissioner appeals that decision to the board within 30 days of the filing of public notice of the decision ~~with the board staff~~. The ~~board staff~~ department shall give written notice to persons that have asked to be notified of the decision. The board may allow the record to be supplemented when it finds that the evidence offered is relevant and material and that:

~~(1) A~~ (1) An interested party seeking to supplement the record participated in the department licensing process and:

(1) has shown due diligence in bringing the evidence to the licensing process at the earliest possible time; or

(2) The evidence is newly discovered and could not, by the exercise of diligence, have been discovered in time to be presented earlier in the licensing process.

The board is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of law established by the commissioner. Any changes made by the board under this paragraph must be based upon the board's review of the record, any supplemental evidence admitted by the board and any hearing held by the board;

~~B. License or permit decisions made by the commissioner that the board votes to review within 30 days of the next regularly scheduled board meeting following written notification to the board of the commissioner's decision. Except as provided in paragraph D, the procedures for review are the same as provided under paragraph A;~~

C. License or permit decisions appealed to the board under another law. Unless the law provides otherwise, the standard of review is the same as provided under paragraph A; and

D. License or permit decisions regarding an expedited wind energy development as defined in Title 35-A, section 3451, subsection 4 or a general permit pursuant to section 480-HH or section 636-A. In reviewing an appeal of a license or permit decision by the commissioner under this paragraph, the board shall base its decision on the administrative record of the department, including the record of any adjudicatory hearing held by the department, and any supplemental information allowed by the board using the standards contained in subsection 5 for supplementation of the record. The board may remand the decision to the department for further proceedings if appropriate. The chair of the Public Utilities Commission or the chair's designee serves as a nonvoting member of the board and is entitled to fully participate but is not required to attend hearings when the board considers an appeal pursuant to this paragraph. The chair's participation on the board pursuant to this paragraph does not affect the ability of the Public Utilities Commission to submit information to the department for inclusion in the record of any proceeding before the department

5. Requests for reconsideration. A person aggrieved by a decision of the board on a permit or license application may petition the board once to reconsider that decision, ~~except that a person may not petition the board to reconsider a decision that is an appeal or review of a final license or permit decision made by the commissioner under subsection 4, paragraph A.~~ A petition for reconsideration must be made in writing within 30 days after the board's decision and may be made for:

A. Correction of any part of the decision that the petitioner believes to be in error and not intended by the board;

B. An opportunity to present new or additional evidence to secure reconsideration of any part of the decision; or

C. A challenge to any fact of which official notice was taken.

The petition must set forth in detail the findings, conclusions or conditions to which the petitioner objects, the basis of the objections, the nature of any new or additional evidence to be offered and the nature of the relief requested. Within 30 days of receiving a complete reconsideration petition, the board shall decide whether to reconsider its decision. The board may hold a hearing within 30 days of its decision to reconsider the decision.

In considering the petition, the board may grant the petition in full or in part, or dismiss the petition. The board shall provide reasonable notice to interested persons.

The board may allow the record to be supplemented when it finds that the evidence offered is relevant and material and that an interested party seeking to supplement the record has shown due diligence in bringing the evidence to the licensing process at the earliest possible time or the evidence is newly discovered and could not, by the exercise of diligence, have been discovered in time to be presented earlier in the licensing process.

The running of the time for appeal under section 346, subsection 1, is terminated by a timely petition for reconsideration filed under this subsection. The full time for appeal commences and is computed from the date of the final board action dismissing the petition or another final board action as a result of the petition.

The filing of a petition for reconsideration is not an administrative or judicial prerequisite for the filing of an appeal under section 346, subsection 1.

6. Enforcement. The board shall:

A. Hear appeals of administrative complaints filed pursuant to Section 347-A, subsection 1(3);

~~A. Advise the commissioner on enforcement priorities and activities;~~

~~B. Advise the commissioner on the adequacy of penalties and enforcement activities;~~

C. Approve administrative consent agreements entered into by the commissioner following the filing of an administrative complaint; pursuant to section 347-A, subsection 1; and

D. Hear appeals of emergency orders pursuant to section 347-A, subsection 3.

~~**7. Reports to the Legislature.** The board shall report to the joint standing committee of the Legislature having jurisdiction over energy and natural resource matters by January 15th of the first regular session of each Legislature on the effectiveness of the environmental laws of the State and any recommendations for amending those laws or the laws governing the board.~~

8. Other duties. The board shall carry out other duties as required by law.

§341-E. Board meetings proceedings

Board meetings held under section 341-D, subsections 1 to 7, are governed by the following provisions.

1. Quorum. ~~Six~~Two members of the board constitute a quorum for a vote of the board ~~or any proceeding properly before, 6 members constitute a quorum for rule-making hearings held by the board and 3 members constitute a quorum for other hearings held by the board.~~ In the event of the recusal of two members of the board for conflict of interest reasons, a single member of the board may decide the matter before the board that is the subject of the conflicts of interest.

2. Proceedings recorded. All non-hearing proceedings before the board must be recorded electronically; all hearings before the board must be transcribed.

§341-F. Administration

Responsibility for the administration of the board lies with the chair.

1. Staff. ~~Staff of the board must be hired by the chair with the consent of the board chief judge.~~ The executive analyst shall direct the daily administrative and operational functions of the board and board staff in an impartial and objective manner. The board shall prescribe the duties of the

executive analyst. The executive analyst is prohibited from participating in any activity that substantially compromises the executive analyst's ability to discharge effectively and impartially the executive analyst's duties to the board.

2. Unclassified employee. The executive analyst of the board is unclassified and may be removed by majority vote of the board.

3. Conflict of interest. Notwithstanding Title 5, section 18, subsection 1, each professional staff member of the board is an "executive employee" solely for the purposes of Title 5, section 18.

4. Budget. The board shall prepare and adopt a biennial operating budget to be submitted to the commissioner for inclusion in the department's budget.

5. Consultants. The board may obtain the services of consultants on a contractual basis or otherwise as necessary to carry out the responsibilities under this Title.

~~**6. Cooperation with other agencies.** The board may cooperate with other state or federal departments or agencies to carry out the responsibilities under this Title.~~

§341-G. Board of Environmental Protection Fund

There is established the Board of Environmental Protection Fund to be used by the board as a nonlapsing fund to carry out its duties under this Title. Notwithstanding any other provision of law, the funds identified in subsection 1 transfer annually to the Board of Environmental Protection Fund in an amount not to exceed \$325,000 _____. Money in the Board of Environmental Protection Fund may only be expended in accordance with allocations approved by the Legislature.

1. Transfer funds. The amount transferred from each fund must be proportional to that fund's contribution to the total special revenues received by the department under chapter 2, subchapter 2; sections 551, 569-A and 569-B; and chapter 13, subchapter 4. Any funds received by the board from the General Fund must be credited towards the amount owed by the Maine Environmental Protection Fund, chapter 2, subchapter 2.

2. Investment of funds. Money in the Board of Environmental Protection Fund not currently needed to meet the obligations of the board in the exercise of its responsibilities under this Title must be deposited with the Treasurer of State to the credit of the fund and may be invested as provided by law. Interest on these investments must be credited to the fund.

§342. Commissioner, duties

(CONTAINS TEXT WITH VARYING EFFECTIVE DATES)

The Commissioner of Environmental Protection shall have the following duties:

1.

1-A. Administration of department. The commissioner is the chief administrative officer of the department and responsible for all administrative matters of the department, except as otherwise specified. The commissioner shall assure that all determinations made by the staff of the department are promptly rendered. The commissioner shall resolve disputes between department staff and applicants with respect to any questions regarding requirements, interpretation or application of the laws, rules or department policy. In resolving disputes, the commissioner shall attempt to reach a fair and appropriate result given all of the circumstances of the issue and may utilize the services of such consultants or experts as the commissioner determines would be helpful to resolve any disputed issue. For purposes of this subsection and section 341-A, subsection 3, paragraph C, staff of the department does not include staff of the board.

2. Employment of personnel. The commissioner may employ, subject to the Civil Service Law, personnel for the department and prescribe the duties of these employees, except persons occupying the positions defined in Title 5, section 938, subsection 1-A, as the commissioner determines necessary to fulfill the duties of the department. For purposes of this subsection, personnel for the department does not include staff of the board.

3.

3-A. Negotiating agreements. The commissioner may negotiate and enter into agreements with federal, state and municipal agencies.

4. Organization of department. The commissioner, ~~after consultation with the Board of Environmental Protection,~~ shall organize the department into the bureaus, divisions, regional offices and other administrative units necessary to fulfill the duties of the department. ~~After consultation with the board,~~ The commissioner shall prescribe the functions of the bureaus and other administrative units to insure that the powers and duties of the department are administered efficiently so that all license applications and other business of the department may be expeditiously completed in the public interest.

A. In coordination with the Health and Environmental Testing Laboratory in the Department of Health and Human Services, the commissioner shall ensure that sampling, data handling and analytical procedures are carried out in accordance with the highest professional standards so that data generated for departmental programs are of known and predictable precision and accuracy.

B. (TEXT EFFECTIVE UNTIL 7/1/12) The Office of Pollution Prevention is established within the department to review department programs and make recommendations to the commissioner on means of integrating pollution prevention into department programs. The Office of Pollution Prevention has the following functions:

(1) To establish pollution prevention priorities within the department;

(2) To coordinate department pollution prevention activities with those of other agencies and entities;

- (3) To ensure that rules, programs and activities of the department are consistent with pollution prevention goals and do not hinder pollution prevention initiatives;
- (4) To provide technical assistance, training and educational activities to assist the general public, governmental entities and the regulated community with development and implementation of pollution prevention programs as funds allow;
- (5) To establish an award program to recognize businesses, local governments, department staff and others that have implemented outstanding or innovative pollution prevention programs, activities or methods;
- (6) To identify opportunities to use the state procurement system to encourage pollution prevention;
- (7) To develop procedures to determine the effectiveness of the department's pollution prevention programs and activities;
- (8) To assume responsibility for the administration and implementation of chapter 26; and
- (9) To administer and evaluate the Technical and Environmental Assistance Program established in section 343-B.

The commissioner shall designate an employee of the department to manage the functions of the Office of Pollution Prevention. That person may provide independent testimony to the Legislature, may make periodic reports to the administrator of the federal Environmental Protection Agency for transmittal to the United States Congress and may address problems or concerns related to the functions of the office, including the investigation of complaints concerning the Technical and Environmental Assistance Program.

The commissioner shall identify a staff person or persons in each bureau of the department whose primary responsibility is to provide guidance to any party through the permit review process.

B. (TEXT EFFECTIVE 7/1/12) The Office of Pollution Prevention is established within the department to review department programs and make recommendations to the commissioner on means of integrating pollution prevention into department programs. The Office of Pollution Prevention has the following functions:

- (1) To establish pollution prevention priorities within the department;
- (2) To coordinate department pollution prevention activities with those of other agencies and entities;
- (3) To ensure that rules, programs and activities of the department are consistent with pollution prevention goals and do not hinder pollution prevention initiatives;

- (4) To provide technical assistance, training and educational activities to assist the general public, governmental entities and the regulated community with development and implementation of pollution prevention programs as funds allow;
- (5) To establish an award program to recognize businesses, local governments, department staff and others that have implemented outstanding or innovative pollution prevention programs, activities or methods;
- (6) To identify opportunities to use the state procurement system to encourage pollution prevention;
- (7) To develop procedures to determine the effectiveness of the department's pollution prevention programs and activities;
- (8) To assume responsibility for the administration and implementation of chapter 27; and
- (9) To administer and evaluate the Technical and Environmental Assistance Program established in section 343-B.

The commissioner shall designate an employee of the department to manage the functions of the Office of Pollution Prevention. That person may provide independent testimony to the Legislature, may make periodic reports to the administrator of the federal Environmental Protection Agency for transmittal to the United States Congress and may address problems or concerns related to the functions of the office, including the investigation of complaints concerning the Technical and Environmental Assistance Program.

The commissioner shall identify a staff person or persons in each bureau of the department whose primary responsibility is to provide guidance to any party through the permit review process.

5. Designation of deputy commissioner.

5-A. Designation of deputy commissioner and directors. The commissioner may employ, to serve at his pleasure, the following:

A. A deputy commissioner;

B.

C. Directors as defined in Title 5, section 938, subsection 1-A.

6. Technical services.

7. Representation in court. The commissioner may authorize licensed Maine attorneys with active bar status who are employees of the department and certified employees of the department to serve civil process and represent the department in District Court in the prosecution of violations of those laws enforced by the department and set forth in Title 4, section 152, subsection 6-A. The commissioner may authorize licensed Maine attorneys with active bar status

who are employees of the department and certified employees of the department to represent a municipality in an action to obtain an administrative search warrant to allow entry of a local plumbing inspector onto property without the consent of the property owner in order to inspect a subsurface waste water disposal system in an area designated by the department as provided in section 424-A, subsection 3, paragraph A. Licensed Maine attorneys do not need to file the certification referred to in the Maine Rules of Civil Procedure, Rule 80K(h). Certification of nonattorney employees must be provided as under Title 30-A, section 4453.

8. Data base. The commissioner shall develop by January 1, 1991, and maintain a data base of license applications received and decisions made by the department. The data base must include information on all applications pending or received after January 1, 1990. For each application the data base must include:

- A. The type of license sought;
- B. The name and address of the applicant and the name of a natural person who is the representative of the applicant;
- C. The location of the project;
- D. The date of acceptance of the application for processing;
- E. The current processing status of the application;
- ~~F. An indication of whether the commissioner or the board will decide the application;~~
- G. A brief description of the project, including any substantial issues raised during the licensing process; and
- H. A brief description of the final action taken by the department, either by the commissioner or the board, on the application.

The commissioner shall maintain a central archive of all applications received and licenses issued by the department.

~~9. Rules.~~ The commissioner may submit to the board new or amended rules for its adoption.

Rulemaking. Subject to the Maine Administrative Procedure Act, the department shall propose, adopt, amend or repeal reasonable rules and emergency rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering. The department shall also adopt, amend and repeal rules as necessary for the conduct of its business.

The department shall identify in its regulatory agenda, when feasible, a proposed rule or provision of a proposed rule that is anticipated to be more stringent than the federal standard, if an applicable federal standard exists.

During the consideration of any proposed rule by the department, when feasible, and using information available to it, the department shall identify provisions of the proposed rule that the

department believes would impose a regulatory burden more stringent than the burden imposed by the federal standard, if such a federal standard exists, and shall explain in a separate section of the basis statement the justification for the difference between the agency rule and the federal standard.

Notwithstanding Title 5, chapter 375, subchapter II, the department shall accept and consider additional public comment on a proposed rule following the close of the formal rule-making comment period at a meeting that is not a public hearing only if the additional public comment is directly related to comments received during the formal rule-making comment period or is in response to changes to the proposed rule. Public notice of the meeting must comply with Title 1, section 406 and state that the department will accept additional public comment on the proposed rule at that meeting.

10. Consultants. The commissioner may contract with or otherwise employ consultants for services necessary to carry out duties under this Title.

11. Administrative duties for the board. The commissioner shall meet the administrative requirements of the board including bookkeeping, expense reimbursement and payroll matters.

~~**11-A. Recommendations and assistance to board.** The commissioner shall make recommendations to the board regarding proposed rules; permit and license applications; modification, revocation or suspension of licenses; appeals of license and permit decisions; and other matters considered by the board. The commissioner shall also provide the board with the technical services of the department.~~

12. Coordination and assistance procedures. The commissioner shall establish procedures to assist the public and applicants and coordinate processing for all environmental permits issued by the department. These procedures must, to the extent practicable, ensure:

- A. Availability to the public of necessary information concerning these environmental permits;
- B. Assistance to applicants in obtaining environmental permits from the department; and
- C. That the public understands the permitting process and all the procedures of the department including those of the board. Any written material must be in clear, concise language.

13. Agricultural impacts. The commissioner shall notify and regularly inform the Commissioner of Agriculture, Food and Rural Resources on proposed legislation or rules that may affect agricultural activity.

14. Environmental priorities report.

15. Technical services. The commissioner shall establish a technical services unit within the department to assist any person involved in a real estate transaction in determining whether real property that is the subject of the transaction has been the site of a discharge, release or threatened release of a hazardous substance, hazardous waste, hazardous matter, special waste, pollutant or contaminant, including petroleum products or by-products.

The commissioner may also assist in or supervise the development and implementation of reasonable and necessary response actions. Assistance may include review of agency records and files, review and approval of a requester's investigation plans, site assessments and reports, voluntary response action plans and implementation of those plans.

The person requesting assistance under this subsection shall pay the department an initial nonrefundable fee of up to \$500 to be determined by the Commissioner. The person shall also pay the department for its actual direct and indirect costs of providing assistance, which must be determined by the commissioner but which must not on an hourly basis exceed \$50 per hour per person. Money received by the department for assistance under this subsection must be deposited in the Uncontrolled Sites Fund.

16. Receipt of funds. Through the Department of Administrative and Financial Services, the commissioner may establish accounts as necessary for the administration of funds held temporarily by the department and restricted to specific purposes by court order or otherwise, such as escrow funds, funds from court decrees and intervenor fees. The State Budget Officer may provide for allotment of the funds as requested. Funds received must be deposited with the Treasurer of State to the credit of the appropriate account and be invested, as provided by law, with interest credited to the account.

17. Serve as a director of Clean Government Initiative. The commissioner shall serve as a director, along with the Commissioner of Administrative and Financial Services, of the Clean Government Initiative established in section 343-H.

18. Reports to the Legislature. The department shall report to the joint standing committee of the Legislature having jurisdiction over energy and natural resource matters by January 15th of the first regular session of each Legislature on the effectiveness of the environmental laws of the State and any recommendations for amending those laws or the laws governing the department.

19. Cooperation with other agencies. The department may cooperate with other state or federal departments or agencies to carry out the responsibilities under this Title.

§342-A. Operations

(REPEALED)

§342-B. Liability of fiduciaries and lenders

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. The following must be considered in determining whether a secured lender is "acting diligently to sell or otherwise divest" or as "evidence of diligent efforts to sell or divest:"

(1) Use of the property during the period;

(2) Market conditions;

(3) Marketability of the site; or

(4) Legal constraints on the sale or divestment.

If the lender holds the property for longer than the 5-year period but meets the conditions in subsection 4, paragraph C, subparagraph (4) and the requirements enumerated in this paragraph, then liability is not imposed on the lender.

B. "Assets of the estate or trust" means assets of the estate or trust of which the site is a part; assets that subsequent to knowledge of the release are placed by the fiduciary or the grantor in an estate or trust over which the fiduciary has control if the grantor is or was an owner or operator of the release site at the time of the transfer; and assets that are transferred by the fiduciary upon or subsequent to knowledge of the release for less than full and fair consideration, to the extent of the amount that the fair market value exceeded the consideration received by the estate or trust.

C. "Participates in management" means, while the borrower is in possession of the facility, executing decision-making control over the borrower's management of oil or hazardous materials or exercising control over substantially all of the operational aspects of the borrower's enterprise, but does not include the following:

- (1) Conducting or requiring site assessments of the property;
- (2) Engaging in periodic or regular monitoring of the business;
- (3) Financing conditioned on compliance with environmental laws;
- (4) Providing general business or financial advice, excluding management of hazardous materials and oil;
- (5) Providing general advice with respect to site management;
- (6) Policing the security interest or loan;
- (7) Engaging in work-out activities prior to foreclosure; or
- (8) Participating in foreclosure proceedings

2. Exemption from liability. Subject to the provisions of this section, a person may not be deemed a responsible party and that person is not subject to department orders or other enforcement proceedings, liable or otherwise responsible under sections 568; 570; 1304, subsection 12; 1318-A; 1319-J; 1361 to 1367; and 1371 for discharges, releases or threats of releases of a hazardous substance, hazardous waste, hazardous matter, special waste, pollutant or contaminant or a petroleum product or by-product if that person is:

A. A fiduciary, as defined in section 1362, subsection 1-D, but that exclusion does not apply to an estate or trust of which the site is a part; or B. A lender, as defined in section 1362, subsection

1-B, who, without participating in management of a site, holds indicia of ownership primarily to protect a security interest in the site.

3. Exclusion from exemption for fiduciaries. The exemption from liability provided by subsection 2 does not apply if:

A. The fiduciary causes, contributes to or exacerbates the discharge, release or threat of release; or

B. After acquiring title to or commencing control or management of the site, the fiduciary does not:

(1) Notify the department within a reasonable time after obtaining knowledge of a release or threat of release;

(2) Provide reasonable access to the site to the department and its authorized representatives so that necessary response actions may be conducted; and

(3) Undertake reasonable steps to control access and prevent imminent threats to public health and the environment.

4. Exclusion from exemption for lenders. The exemption from liability for lenders provided in subsection 2 does not apply if:

A. The secured lender causes, contributes to or exacerbates the discharge, release or threat of release;

B. The secured lender participates in management of the site prior to acquiring ownership of the site; or

C. After acquiring ownership of the site and upon obtaining knowledge of a release or threat of release, the secured lender does not:

(1) Notify the department within a reasonable time after obtaining knowledge of a release or threat of release;

(2) Provide reasonable access to the department and its authorized representatives so that necessary response actions may be conducted;

(3) Undertake reasonable steps to control access and prevent imminent threats to public health and the environment; and

(4) Act diligently to sell or otherwise divest the property within a limited time period of up to 5 years from the earlier of the lender's possession or ownership. There is a rebuttable presumption that the 2nd lender is acting diligently to sell or otherwise divest the property during the first 18 months after taking possession. The secured lender must demonstrate by a preponderance of the evidence diligent efforts to sell or divest the property during the next 42 months.

When a lender has ownership or possession of a site pursuant to a security interest in the site, the term "owner" or "operator" means a person who owned or operated the site immediately prior to that secured lender obtaining ownership or possession of the site.

5. Relationship to ground water fund claims. The exemption provided in subsection 2, paragraph B from liability under section 570 does not exempt lenders who apply to the Ground Water Oil Clean-up Fund for coverage pursuant to section 568-A from the obligation to pay the full amount of deductible determined by the commissioner.

6. Exempt person as party. Notwithstanding the exemption from liability provided by this section, a fiduciary may be named as a party in an administrative enforcement proceeding or civil action brought by the State pursuant to this Title for purposes of requiring the submission of information or documents relating to an uncontrolled hazardous substance site, for purposes of proceeding against the assets of the estate or trust for reimbursement, fines or penalties or for purposes of compelling the expenditure of assets of the estate or trust by the fiduciary to abate, clean up or mitigate threats or hazards posed by a discharge or release, or to comply with state environmental laws and regulations or the terms of a department order of enforcement proceeding. This subsection does not require the fiduciary to expend its own funds or to make the fiduciary personally liable for compliance pursuant to an order or enforcement proceeding except as provided in section 568, subsection 4, paragraph B or section 1365, subsection 6.

§344. Processing of applications

1. Acceptance and notification. The commissioner shall notify the applicant in writing of the official date on which the application was accepted as complete for processing or the reasons the application was not accepted. If a written notice of acceptance or nonacceptance is not mailed to the applicant within 15 working days of receipt of the application, the application is deemed to be accepted as complete for processing on the 15th working day after receipt by the department. If the application is not accepted, the commissioner shall return the application to the applicant with the reasons for nonacceptance specified in writing. Any applicant whose application has not been accepted by the commissioner shall attend a presubmission meeting with the department before resubmitting that application. The commissioner shall notify the ~~board~~ public of all applications accepted as complete.

An application is acceptable as complete for processing if the application is properly filled out and information is provided for each of the items included on the form. Acceptance of an application as complete for review does not constitute a determination by the department on the sufficiency of that information and does not preclude the department from requesting additional information during processing.

The commissioner shall require the applicant to provide notice to the public for each application for a permit or license accepted. The commissioner shall solicit comments from the public for each application in a manner prescribed by ~~the board~~ in the rules.

All correspondence notifying an applicant of denial of an application by the ~~board~~ or commissioner must be by certified mail, return receipt requested.

1-A. Governing rules. An application for a permit, license or approval is processed under the substantive rules in effect on the date the application or request for approval is determined to be complete for processing. Notwithstanding Title 1, section 302, after the Administrator of the United States Environmental Protection Agency ceases issuing permits for discharges of pollutants to waters of this State pursuant to the administrator's authority under Section 402 (c)(1) of the Federal Water Pollution Control Act, as amended, any waste discharge license issued or modified by the State pursuant to its authority to grant permits under the Federal Water Pollution Control Act must comply with State statutory or regulatory requirements that take effect prior to final issuance of that license.

2. Delegation.

2-A. Processing time limits, decisions and appeals. After the commissioner accepts an application for processing, the commissioner may approve, approve with conditions, or disapprove ~~or refer~~ the application as follows.

A. Except as otherwise provided in this paragraph, ~~the commissioner shall decide as expeditiously as possible if an application meets one or more of the criteria set forth in section 341-D, subsection 2 and shall request that the board assume jurisdiction of that application. If at any subsequent time during the review of an application the commissioner decides that the application falls under section 341-D, subsection 2, the commissioner shall request that the board assume jurisdiction of the application.~~

~~(1) The commissioner may not request the board to assume jurisdiction of an application for any permit or other approval required for an expedited wind energy development, as defined in Title 35-A, section 3451, subsection 4, a certification pursuant to Title 35-A, section 3456 or a general permit pursuant to section 480-III or section 636-A. Except as provided in subparagraph (2), the commissioner shall issue a decision on an application for an expedited wind energy development, an offshore wind power project or a hydropower project, as defined in section 632, subsection 3, that uses tidal action as a source of electrical or mechanical power within 185 days of the date on which the department accepts the application as complete pursuant to this section or within 270 days of the department's acceptance of the application if the commissioner holds a hearing on the application pursuant to section 345-A, subsection 1-A.~~

~~(2) The expedited review periods of 185 days and 270 days specified in this subparagraph (1) do not apply to the associated facilities, as defined in Title 35-A, section 3451, subsection 1, of the development if the commissioner determines that an expedited review time is unreasonable due to the size, location, potential impacts, multiple agency jurisdiction or complexity of that portion of the development. If an expedited review period does not apply, a review period specified pursuant to section 344-B applies.~~

The commissioner may stop the processing time with the consent of the applicant for a period of time agreeable to the commissioner and the applicant.

B. The commissioner shall decide whether an application meets the permit by rule provisions under subsection 7 within 20 working days after notifying the applicant of acceptance of the application.

C. For those applications that do not fall under the permit by rule provisions of subsection 7, the commissioner shall decide upon the application pursuant to the provisions of section 344-B.

Any person aggrieved by a final license or permit decision of the commissioner may appeal that decision to the board. The filing of an appeal with the board is not a prerequisite for the filing of a judicial appeal.

2-B. Conflict with federal requirements. The commissioner may waive the time requirements of this section for those activities which require a federal permit or license when those provisions are inconsistent with federal law.

3. Time limits for processing applications.

4. Exceptions.

4-A. Draft decisions and commissioner recommendations. Draft permits and licenses and ~~commissioner recommendations~~ are subject to the following provisions.

A. For those applications to be decided by the commissioner that do not fall under the permit by rule provisions of subsection 7, the commissioner shall, if requested by the applicant or any interested party, issue a draft permit or license and shall give reasonable notice to the applicant and to any other person who has notified the commissioner of an interest in the application before the commissioner takes final action on the application. The draft permit or license must be made available to the applicant and to all interested persons at the Augusta and appropriate regional offices of the department at least 5 working days before the commissioner takes final action on the application.

~~B. For those applications to be decided by the board, the commissioner shall provide a summary of the application to the board, all interested governmental agencies and other interested parties in a manner prescribed by the board by rule. The rule must provide at least 10 working days for the receipt of comments on the application prior to the preparation of a draft permit or license. If requested by the applicant or any interested party, the commissioner shall prepare a draft permit or license and shall give reasonable notice of the date the board will act on the application to the applicant and to any other person who has notified the commissioner of an interest in the application. The draft permit or license must be made available to the applicant and to all interested persons at the Augusta and appropriate regional offices of the department at least 15 working days before the board acts on the application.~~

B. The commissioner may incorporate comments on draft permits at the discretion of the commissioner. The commissioner may make any revised draft available for public comment. If the commissioner decides the draft is substantially revised, the commissioner shall make it available for public comment.

5. Reconsideration.

6. Fees. The commissioner may establish reasonable fees for the reproduction of materials in the department's custody, including all or part of any application submitted to the department and any records of public hearings. All such fees may be retained by the department and deposited in

the Maine Environmental Protection Fund to reimburse expenses incurred in reproducing these materials.

7. Permit by rule. The ~~Board of Environmental Protection department~~ may permit, by rule, any class of activities that would otherwise require the individual issuance of a permit or approval by the ~~board department~~, if the ~~board department~~ determines that activities within the class will have no significant impact upon the environment. Any such rule must describe with specificity the class of activities covered by the rule and may establish standards of design, construction or use as may be considered necessary to avoid adverse environmental impacts. Any such rule must require notification to the commissioner prior to the undertaking of the regulated activity.

The commissioner shall annually review activities requiring permits or approval from the department to determine whether any additional classes of activities are more effectively administered under a permit by rule system. As part of this review, the commissioner shall solicit public comments on recommendations for activities to be included under permit by rule and shall review the performance of the existing permit by rule program, including a review of the compliance record of the permit by rule program. The commissioner shall annually ~~recommend~~ report to the board-joint standing committee of the Legislature having jurisdiction over natural resource matters the results of his review any additional categories of permits for the ~~board department~~ to permit by rule.

8. Effective date of license. Except as provided in this subsection, a license granted by the commissioner is effective when the commissioner signs the license. The commissioner may attach a condition to the license requiring up to a 30-day delay in any physical alteration of the project area and any construction activity authorized by the license. ~~A license granted by the board is effective when the chair of the board or the chair's designee signs the license.~~

9. License renewals and transfers. For purposes of this section, a request for a license or permit renewal or transfer is considered an application.

10. Voluntary surrender. Unless otherwise provided in this Title or rules adopted pursuant to this Title, a license may be voluntarily surrendered by the license holder upon department approval.

§344-A. Outside review of applications

The commissioner may enter into agreements with individuals, partnerships, firms and corporations outside the department, referred to throughout this section as "outside reviewers," to review applications or portions of applications submitted to the department. The commissioner has sole authority to determine the applications or portions of applications to be reviewed by outside reviewers and to determine which outside reviewer is to perform the review. When selecting an outside reviewer, all other factors being equal, the commissioner shall give preference to an outside reviewer who is a public or quasi-public entity, such as state agencies, the University of Maine System or the soil and water conservation districts. Except for an agreement for outside review regarding review of an application for a wind energy development as defined in Title 35-A, section 3451, subsection 11, a certification pursuant to Title 35-A, section 3456, an application for an offshore wind power project as defined in section 480-B,

subsection 6-A or a general permit pursuant to section 480-HH or section 636-A or an application for a hydropower project, as defined in section 632, subsection 3, that uses tidal action as a source of electrical or mechanical power, the commissioner may enter into an agreement with an outside reviewer only with the consent of the applicant and only if the applicant agrees in writing to pay all costs associated with the outside review.

1. Standards for outside review. Prior to entering into an agreement with an outside reviewer, the commissioner must determine that:

- A. The agreement protects the public interest and the interest of the applicant;
- B. The agreement ensures a fair, consistent and adequate review of the application;
- C. The agreement provides the public with the same opportunity to comment on the application as would be provided if the application were reviewed by the department;
- D. The outside reviewer meets the minimum qualification standards established by the commissioner; and
- E. The application can not be reviewed by existing departmental personnel in a reasonable period of time.

2. Qualifications. The commissioner shall establish qualification standards for outside reviewers and shall develop a list of qualified outside reviewers. Standards established by the commissioner must include initial qualification standards and standards ensuring that outside reviewers continue to maintain a high level of scientific and regulatory expertise in one or more relevant areas of knowledge.

3. Conflict of interest. An outside reviewer may not review any portion of an application submitted by an applicant who directly or indirectly employed the reviewer in any capacity at any time during the 12-month period immediately preceding the submission of the application. An outside reviewer must sign a written agreement with the commissioner not to be employed, directly or indirectly, by any applicant whose application was reviewed by that reviewer for at least 12 months from the date the review of the application is complete.

4. Penalty. Notwithstanding section 349, any person who knowingly violates subsection 3 is guilty of a Class D crime. Notwithstanding Title 17-A, sections 4-A and 1301, the fine for each violation may not be less than \$5,000 nor more than \$25,000.

5. Repeal.

§344-B. Timetables for processing permit applications

Pursuant to the provisions of this section, the commissioner shall determine and annually publish a processing time for each type of permit or license issued by the department. When establishing processing times for permits or licenses, the commissioner shall take into consideration all duties and responsibilities of the department and the availability of resources.

The provisions of this section apply only to new permit and license applications.

1. Publication of timetables. No later than November 1st of each year, the commissioner shall publish processing timetables for each permit and license issued by the department. Permit and license processing timetables must be published simultaneously in all newspapers designated by the Secretary of State as papers of record under Title 5, section 8053, subsection 5. The commissioner shall enter the published processing timetables into the record of the board at the first meeting of the board following publication.

Except as provided in this section, the deadline governing the processing of an application is determined by the timetable in effect on the date the application is determined to be complete.

2. Consultation. Prior to publishing timetables pursuant to subsection 1, the commissioner shall review the proposed processing timetables with an advisory committee established for that purpose. The commissioner shall appoint the members of the advisory committee. In appointing the members, the commissioner shall seek to appoint a committee that is broadly representative of business, environmental and other interest groups. The purpose of the committee is solely advisory.

3. Processing period. The processing period for an application begins on the date the commissioner notifies the applicant that the application is complete. Except as provided in paragraph A, the consent of the applicant is required to stop the processing period or to extend the deadline.

A. The processing time for an application stops if:

(1) The commissioner determines that a public hearing is required. Under this subparagraph, the processing period may be stopped only for as long as necessary to accommodate the public hearing process and must commence at the end of the comment period following the public hearing; or

~~(2) The board assumes jurisdiction over an application. If the board assumes jurisdiction over an application, the board shall set a new timetable for the application and shall stop the processing period or extend the deadline subject to the conditions of this subsection. The forfeiture provisions of subsection 5 do not apply to timetables set by the board; or~~

(3) The commissioner determines that the applicant has significantly modified the application. Under this subparagraph, the processing period is stopped until the applicant and the commissioner agree to a new timetable.

B. The commissioner may stop the processing time with the consent of the applicant for any period of time agreeable to the commissioner and the applicant if the commissioner determines that:

(1) Additional information is required from the applicant;

(2) Agencies other than the department that are required to comment on an application do not respond within the time frames established by a memorandum of understanding between the agencies; or

(3) The applicant wishes to stop the processing period or to extend the deadline.

Expiration of a processing period may not be the sole reason for denial of an application.

4. Multiple permits. For projects that require more than one permit from the department, the commissioner and the applicant shall determine the timetable or timetables applicable to all permit or license applications required for that project at a presubmission meeting; provided, however, the processing time for projects that require more than one permit shall not exceed the published timetable for the permit with the longest timetable for processing plus 30 days.

5. Forfeiture. If the commissioner fails to approve or deny an application prior to the applicable deadline, the commissioner shall pay the applicant an amount equal to 50% of the permit or license processing fee. The remainder of the permit or license processing fee is payable to the applicant if the commissioner does not approve or deny the application within 120 calendar days after that deadline. Forfeitures payable under this subsection may not exceed the permit or license processing fee paid by the applicant.

6. Report.

§345. Hearings

(REPEALED)

§345-A. Hearings

1. Hearings.

1-A. Department hearings. The board and commissioner may hold public hearings as necessary to carry out responsibilities under this Title.

2. Maine Administrative Procedure Act. Except as provided elsewhere, all hearings of the department must be conducted in accordance with the procedural requirements of the Maine Administrative Procedure Act, Title 5, chapter 375 and procedural rules adopted by the department.

2-A. Intervenor procedures. The board shall adopt rules that define the procedures and scope of participation for intervenors.

3. Fees. The Commissioner of Environmental Protection may establish fees which recover the expenses entailed in providing notice to interested persons required by this section or reproducing all or any part of the record of any hearings for the applicant or interested persons.

4. Subpoena power. The board and commissioner may each issue subpoenas to compel the production of books, records and other data related to the matters in issue at any hearing. If any

person served with a subpoena demonstrates to the satisfaction of the issuer of the subpoena that the production of the information would, if made public, divulge methods or processes which are entitled to protection as trade secrets, the information shall be disclosed only at a nonpublic portion of the hearing and shall be confidential and not available for public inspection. If any person fails or refuses to obey such a subpoena, the issuer of the subpoena may apply to any Justice of the Superior Court for an order compelling that person to comply with the subpoena. The Superior Court may issue an order and may punish failure to obey the order as civil contempt.

5. Public meetings. At the ~~board's or~~ commissioner's discretion, the ~~board or~~ commissioner may schedule and hold public meetings in the geographic area of a proposed project for the purpose of collecting comments that become part of the record in a pending action. Any such meeting must be held during the period when written public comments may be submitted to the department. This subsection and the conduct of a public meeting do not change any other obligation the department has to hold public hearings that are mandatory by statute or required after a timely request is filed.

§346. Judicial appeals

(CONFLICT)

1. Appeal to Superior Court. Except as provided in subsection 4 and section 347-A, subsection 3 or 4, any person aggrieved by any order or decision of the board or commissioner may appeal to the Superior Court. These appeals to the Superior Court must be taken in accordance with Title 5, chapter 375, subchapter 7.

2.

2-A. Appeal. Any party to the appeal in the Superior Court under this section may obtain review by appeal to the Supreme Judicial Court sitting as the law court. The appeal shall be taken as in other civil cases.

3. Limitation.

4. (CONFLICT: Text as amended by PL 2009, c. 615, Pt. E, §5) Appeal of decision. A person aggrieved by an order or decision of the ~~board or~~ commissioner regarding an application for an expedited wind energy development, as defined in Title 35-A, section 3451, subsection 4, or a general permit pursuant to section 480-HH or section 636-A may appeal to the Supreme Judicial Court sitting as the law court. These appeals to the law court must be taken in the manner provided in Title 5, chapter 375, subchapter 7.

4. (CONFLICT: Text as amended by PL 2009, c. 642, Pt. B, §4) Appeal of decision regarding an expedited wind energy development. A judicial appeal of final action by the ~~board or~~ commissioner regarding an application for an expedited wind energy development, as defined in Title 35-A, section 3451, subsection 4, must be taken to the Supreme Judicial Court sitting as the Law Court. The Law Court has exclusive jurisdiction over request for judicial review of final action by the commissioner ~~or the board~~ regarding expedited wind energy developments. These

appeals to the Law Court must be taken in the manner provided in Title 5, chapter 375, subchapter 7 and the Maine Rules of Civil Procedure, Rule 80C.

§347. Violations

(REPEALED)

§347-A. Violations

1. General procedures. This subsection sets forth procedures for enforcement actions.

A. Whenever it appears to the commissioner, after investigation, that there is or has been a violation of this Title, of rules adopted under this Title or of the terms or conditions of a license, permit or order issued by the ~~board or the~~ commissioner, the commissioner may initiate an enforcement action by taking one or more of the following steps:

(1) Resolving the violation through an administrative consent agreement pursuant to subsection 4, signed by the violator and approved by the ~~board and the~~ Attorney General;

(2) Referring the violation to the Attorney General for civil or criminal prosecution;

(3) ~~Scheduling and holding~~ Filing an administrative complaint with the board regarding the alleged violation triggering an enforcement hearing on the alleged violation pursuant to subsection 2; or

(4) With the prior approval of the Attorney General, commencing a civil action pursuant to section 342, subsection 7 and the Maine Rules of Civil Procedure, Rule 3.

B. Before issuing an administrative complaint or initiating a civil enforcement action pursuant to paragraph A, the commissioner shall issue a notice of violation to the person or persons the commissioner considers likely to be responsible for the alleged violation or violations. The notice of violation must describe the alleged violation or violations, to the extent then known by the commissioner; cite the applicable law, rule and term or condition of the license, permit or order alleged to have been violated; and provide time periods for the alleged violator to take necessary corrective action and to respond to the notice. For violations the commissioner finds to be minor, the notice may state that further enforcement action will not be pursued if compliance is achieved within the time period specified in the notice or under other appropriate circumstances. The commissioner is not required to issue a notice of violation before issuing an emergency order pursuant to subsection 3 or other applicable provision of this Title; nor is the commissioner required to issue a notice of violation before referring an alleged violation to the Attorney General for criminal prosecution or in a matter requiring immediate enforcement action.

C.

D.

2. Administrative Hearings. The commissioner shall ~~give at least 30 days' written notice to the alleged violator of the date, time and place of any hearing held~~ serve the administrative complaint filed pursuant to subsection 1, paragraph A, subparagraph (3) on the alleged violator. The ~~notice~~ complaint must specify the act or omission which is claimed to be in violation of law or regulation and must be served personally by the sheriff or deputy sheriff, or by hand delivery by an authorized representative of the department in accordance with the Maine Rules of Civil Procedure, or by registered mail return receipt requested. The alleged violator will have 30 days to answer or otherwise respond to the allegations and to request a hearing with the board.

Any hearing conducted under the authority of this subsection must be in accordance with the provisions of Title 5, chapter 375, subchapter IV and procedural rules adopted by the board. At the hearing, the alleged violator may appear in person or by attorney and answer the allegations of violation and file a statement of the facts, including the methods, practices and procedures, if any, adopted or used by that person to comply with this chapter and present such evidence as may be pertinent and relevant to the alleged violation. The Chief Judge shall refer the parties to mediation if either party requests remediation at or before the time the alleged violator answers the department's administrative complaint. The parties must meet with a mediator appointed by the Court Alternative Dispute Resolution Service created in Title 4, section 18-B at least once and try in good faith to reach an agreement. After the first meeting, mediation must end at the request of either party.

After hearing, or in the event of a failure of the alleged violator to appear on the date set for a hearing, the ~~commissioner~~ board shall, as soon as practicable, make findings of fact based on the record and, if the ~~commissioner~~ board finds that a violation exists, shall issue an order aimed at ending the violation. The person to whom an order is directed shall immediately comply with the terms of that order. In the event that the person to whom the order is directed does not comply with the terms of that order, the department may refer the matter to the Attorney General pursuant to subsection 1, paragraph A, subparagraph 3.

The Commissioner may resolve any allegations in an administrative complaint by an administrative consent agreement. All proposed administrative consent agreements resolving administrative complaints must be reviewed and approved by the Department of the Attorney General prior to being filed with the board. The board shall provide 30 days notice and opportunity for written public comment on an administrative consent agreement prior to the agreement being considered for approval by the board.

3. Emergency orders. Whenever it appears to the commissioner, after investigation, that there is a violation of the laws or regulations the department administers or of the terms or conditions of any of the department's orders that is creating or is likely to create a substantial and immediate danger to public health or safety or to the environment, the commissioner may order the person or persons causing or contributing to the hazard to immediately take such actions as are necessary to reduce or alleviate the danger. Service of a copy of the commissioner's findings and order must be made by the sheriff or deputy sheriff or by hand delivery by an authorized representative of the department in accordance with the Maine Rules of Civil Procedure. In the event that the persons are so numerous that the specified method of service is a practical impossibility or the commissioner is unable to identify the person or persons causing or

contributing to the hazard, the commissioner shall make the order known through prominent publication or announcement in news media serving the affected area.

The person to whom the order is directed shall comply with the order immediately. The order may not be appealed to the Superior Court in the manner provided in section 346, but within 48 hours after receipt of the order the person may apply to the board for a hearing on the order. Within 7 working days after receipt of the application, the board shall hold a hearing, make findings of fact and vote on a decision that continues, revokes or modifies the order. That decision must be in writing and signed by the board ~~chair~~ using any means for signature authorized in the ~~department's~~ board's rules and published within 2 working days after the hearing and vote. The nature of the hearing is an appeal. At the hearing, all witnesses must be sworn and the commissioner shall first establish the basis for the order and for naming the person to whom the order was directed. The decision of the board may be appealed to the Superior Court in the manner provided by section 346.

4. Administrative consent agreements. Following issuance of a notice of violation pursuant to subsection 1 and after receipt of the alleged violator's response to that notice or expiration of the time period specified in the notice for a response, in situations determined by the commissioner appropriate for further enforcement action, the commissioner may send a proposed administrative consent agreement to the alleged violator or violators.

A. Except as otherwise expressly agreed to by the Attorney General, all proposed administrative consent agreements proposed to resolve violations alleged in a notice of violation (prior to issuance of an administrative complaint pursuant to subsection 1, paragraph A, subparagraph 3) must be reviewed and approved by the Department of the Attorney General before being sent to the alleged violator.

B. All proposed administrative consent agreements sent to the alleged violator must be accompanied by written correspondence from the department, in language reasonably understandable to a citizen, explaining the alleged violator's rights and responsibilities with respect to the proposed administrative consent agreement. The correspondence must include an explanation of the factors considered by the commissioner in determining the proposed civil penalty, a statement indicating that the administrative consent agreement process is a voluntary mechanism for resolving enforcement matters without the need for litigation and an explanation of the department's procedures for handling administrative consent agreements. The correspondence must also specify a reasonable time period for the alleged violator to respond to the proposed administrative consent agreement and offer the opportunity for a meeting with department staff to discuss the proposed agreement. Consent agreements shall, to the greatest extent possible, clearly set forth all the specific requirements or conditions with which the alleged violator must comply.

C. After a proposed administrative consent agreement has been sent to the alleged violator, the commissioner may revise and resubmit the agreement if further circumstances become known to the commissioner, including information provided by the alleged violator, that justify a revision.

D. ~~The public may make written comments to the board at the board's discretion~~ department shall provide 30 days notice and opportunity for written public comments on an administrative

consent agreement prior to the agreement being entered into by the commissioner and approved considered for approval by the board.

E. When the department and the alleged violator can not agree to the terms of a consent agreement following issuance of a notice of violation pursuant to subsection 1 and the department elects to bring an enforcement action in District Court pursuant to section 342, subsection 7, the District Court shall refer the parties to mediation if either party requests mediation at or before the time the alleged violator appears to answer the department's complaint. The parties must meet with a mediator appointed by the Court Alternative Dispute Resolution Service created in Title 4, section 18-B at least once and try in good faith to reach an agreement. After the first meeting, mediation must end at the request of either party. If the parties have been referred to mediation, the action may not be removed to Superior Court until after mediation has occurred.

5. Enforcement. All orders of the department and the board may be enforced by the Attorney General and the department. If any order of the department or the board is not complied with, the commissioner shall immediately notify the Attorney General.

6. Public participation in enforcement settlements. After the State receives authority to grant permits under the Federal Water Pollution Control Act, 33 United States Code, 1982, Section 1251 et seq., as amended, in any civil enforcement action brought under this section, section 348 or 349 involving discharges regulated by the Federal Water Pollution Control Act, the department shall publish notice of and provide at least 30 days for public comment on any proposed settlement as follows.

A. In the case of administrative consent agreements, resolving a notice of violation, public notice of the proposed agreement must be filed with the board and notice of the filing must be placed on the board's agenda posted at least 30 days before the board-department takes any action on the agreement. The Attorney General and the department shall receive and consider, ~~and the department shall provide the board with summaries of,~~ any written comments relating to the proposed agreement.

A-1. In the case of an administrative consent agreement resolving an administrative complaint, the agreement must be filed with the board and a public notice of the filing must be provided at least 30 days before the board takes any action on the proposed agreement. The Attorney General shall reserve the right to withdraw or withhold its consent to the proposed judgment if the comments, views or allegations concerning the judgment disclose facts or considerations that indicate that the proposed judgment is inappropriate, improper or inadequate.

B. In the case of judicial enforcement, each proposed judgment by consent must be filed with the court at least 30 days before the judgment is entered by the court. Prior to the entry of judgment, notices of the proposed judgment must be published in a newspaper having general circulation in the area in which the alleged violation occurred, and the Attorney General and the department shall receive and consider, and file with the court, any written comments relating to the proposed judgment.

C. The Attorney General shall reserve the right to withdraw or withhold its consent to the proposed judgment if the comments, views or allegations concerning the judgment disclose facts or considerations that indicate that the proposed judgment is inappropriate, improper or inadequate and oppose an attempt by any person to intervene in the action. When the public interest in this notification process is not compromised, the Attorney General may permit an exception to publication as set forth in this section in a specific case where extraordinary circumstances require a period shorter than 30 days or a notification procedure other than that set forth in this section.

7. Landowner liability for actions of others. An owner, lessee, manager, easement holder or occupant of premises is not subject to criminal sanctions or civil penalties or forfeitures for a violation of laws or rules enforced by the department or the board if that person provides substantial credible evidence that the violation was committed by another person other than a contractor, employee or agent of the owner, lessee, manager, easement holder or occupant. This subsection does not prevent the department, the board or a court from requiring an owner, lessee, manager, easement holder or occupant of premises to remediate or abate environmental hazards or damage or to reimburse the department for the cost of such remediation or abatement. An owner, lessee, manager, easement holder or occupant of premises is subject to criminal sanctions or civil penalties or forfeitures for failure to comply with a lawful administrative order or court order to remediate or abate environmental hazards or damage.

A. The department shall investigate substantiated allegations by an owner, lessee, manager, easement holder or occupant that the violation was caused by another person.

B. If an owner, lessee, manager, easement holder or occupant is subjected to criminal sanctions or civil penalties or forfeitures, or if such a person is required to remediate or abate environmental hazards or damage as a result of violations by another person, the owner, lessee, manager, easement holder or occupant has a cause of action against the actual violator to recover all damages and costs, including attorney's fees, incurred in connection with the environmental damage, and all costs, including attorney's fees, incurred in bringing the action to recover.

C. This subsection does not apply to persons who are defined as "responsible parties" under chapter 3, subchapters II-A and II-B; chapter 13, subchapter II-A; or chapter 13-B.

8. Limitations on air and wastewater discharge enforcement actions. The following limitations apply to air and wastewater discharge enforcement actions.

A. If a licensee has reported to the department a violation of chapter 4 or of rules adopted under chapter 4, an enforcement action for civil or administrative penalties brought by the department or the Attorney General for that violation must be initiated within 10 years of the date the licensee reported the violation to the department.

B. If a licensee has reported to the department a violation of chapter 3, subchapter 1, article 2 or of rules adopted under chapter 3, subchapter 1, article 2, an enforcement action for civil or administrative penalties brought by the department or the Attorney General for that violation must be initiated within 10 years of the date the licensee reported the violation to the department.

§347-B. Modification, revocation or suspension of license

(REPEALED)

§347-C. Right of inspection and entry

Employees and agents of the Department of Environmental Protection may enter any property at reasonable hours and enter any building with the consent of the property owner, occupant or agent, or pursuant to an administrative search warrant, in order to inspect the property or structure, including the premises of an industrial user of a publicly owned treatment works, and to take samples, inspect records relevant to any regulated activity or conduct tests as appropriate to determine compliance with any laws administered by the department or the terms and conditions of any order, regulation, license, permit, approval or decision of the commissioner or of the board.

§348. Judicial enforcement

1. General. In the event of a violation of any provision of the laws administered by the department or of any order, regulation, license, permit, approval or decision of the board or commissioner or decree of the court, as the case may be, the Attorney General or the department may institute injunction proceedings to enjoin any further violation thereof, a civil or criminal action or any appropriate combination thereof without recourse to any other provision of law administered by the department.

2. Restoration. The court may order restoration of any area affected by any action or inaction found to be in violation of any provision of law administered by the department or of any order, rule, regulation, license, permit, approval or decision of the board or commissioner or decree of the court, as the case may be, to its condition prior to the violation or as near thereto as may be possible. Where the court finds that the violation was wilful, the court shall order restoration under this subsection unless the restoration will:

- A. Result in a threat or hazard to public health or safety;
- B. Result in substantial environmental damage; or
- C. Result in a substantial injustice.

3. Injunction proceedings. If the department finds that the discharge, emission or deposit of any materials into any waters, air or land of this State constitutes a substantial and immediate danger to the health, safety or general welfare of any person, persons or property, the department shall forthwith request the Attorney General to initiate immediate injunction proceedings to prevent such discharge or the commissioner may authorize pursuit of such an action in District Court. The injunction proceedings may be instituted without recourse to the issuance of an order, as provided for in section 347-B.

4. Settlement. A person who has resolved that person's liability to the State in an administrative or judicially approved settlement and is implementing or has fully implemented that settlement pursuant to its terms is not liable for claims by other potentially liable persons regarding response actions, response costs or damages, including without limitation natural resource damages, addressed in the settlement. The settlement does not discharge any other potentially liable persons unless its terms so provide. The protection afforded by this subsection includes protection against contribution claims and all other types of claims under state law that may be asserted against the settling party for recovery of response costs or damages incurred or paid by another potentially liable person, if those actions, costs or damages are addressed in the settlement, but does not include protection against claims based on contractual indemnification or other express contractual agreements to pay the costs or damages. A potentially liable person who commences an action against a person who is protected from suits under this subsection is liable to the person against whom the claim is brought for all reasonable costs of defending against the claim, including all reasonable attorney's and expert witness fees. This section is not intended to create a right to contribution or other cause of action or to make a person liable to pay a portion of another person's response costs, damages or civil penalties.

§349. Penalties

1. Criminal penalties. Except as otherwise specifically provided, a person who intentionally, knowingly, recklessly or with criminal negligence violates a law administered by the department, including, without limitation, a violation of the terms or conditions of an order, rule, license, permit, approval or decision of the board or commissioner, or who disposes of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose, in violation of Title 17, section 2264-A, commits a Class E crime. Notwithstanding Title 17-A, section 1301, the fine for a violation of this subsection may not be less than \$2,500 and not more than \$25,000 for each day of the violation, except that the minimum amount for knowing violations is \$5,000 for each day of violation.

This subsection does not apply to actions subject to the criminal penalties set forth in section 1319-T.

2. Civil penalties. Except as otherwise specifically provided, a person who violates a law administered by the department, including, without limitation, a violation of the terms or conditions of an order, rule, license, permit, approval or decision of the board or commissioner, or who disposes of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose, in violation of Title 17, section 2265-A, is subject to a civil penalty, payable to the State, of not less than \$100 and not more than \$10,000 for each day of that violation or, if the violation relates to hazardous waste, of not more than \$25,000 for each day of the violation. This penalty is recoverable in a civil action.

2-A. Supplemental environmental projects. In settling a civil enforcement action for any violation of any of the provisions of the laws administered by the department, including, without limitation, a violation of the terms or conditions of any order, rule, license, permit, approval or decision of the board or commissioner, the parties may agree to a supplemental environmental project that mitigates not more than 80% of the assessed penalty. "Supplemental environmental

project” means an environmentally beneficial project primarily benefiting public health or the environment that a violator is not otherwise required or likely to perform.

A. An eligible supplemental environmental project is limited to the following categories:

- (1) Pollution prevention projects that eliminate all or a significant portion of pollutants at the point of generation;
- (2) Pollution reduction projects that significantly decrease the release of pollutants into a waste stream at the point of discharge to a point significantly beyond levels required for compliance;
- (3) Environmental enhancement projects in the same ecosystem or geographic area of the violation that significantly improve an area beyond what is required to remediate any damage caused by the violation that is the subject of the enforcement action;
- (4) Environmental awareness projects substantially related to the violation that provide training, publications or technical support to members of the public regulated by the department;
- (5) Scientific research and data collection projects that advance the scientific basis on which regulatory decisions are made;
- (6) Emergency planning and preparedness projects that assist state or local emergency response and planning entities in preparing or responding to emergencies; and
- (7) Public health projects that provide a direct and measurable benefit to public health.

B. Supplemental environmental projects may not be used for the following situations:

- (1) Repeat violations of the same or a substantially similar law administered by the department by the same person;
- (2) When a project is required by law;
- (3) If the violator had previously planned and budgeted for the project;
- (4) To offset any calculable economic benefit of noncompliance;
- (5) If the violation is the result of reckless or intentional conduct; or
- (6) If the project primarily benefits the violator.

Any settlement that includes a supplemental environmental project must provide that expenditures are not tax deductible and are ineligible for certification as tax exempt pollution control facilities pursuant to Title 36, chapters 105 and 211.

3. Falsification and tampering. A person may not knowingly:

A. Make a false statement, representation or certification in an application, record, report, plan or other document filed or required to be maintained by any law administered by the department or by any order, rule, license, permit, approval or decision of the board or commissioner;

B. Tamper with or render inaccurate a monitoring device or method required by any law or by any order, rule, license, permit, approval or decision of the board or commissioner; or

C. Fail to comply with an information submittal required by the commissioner pursuant to section 568, subsection 3 or section 1364, subsection 3.

A person who violates this subsection commits a Class E crime. Notwithstanding Title 17-A, section 1301, a fine for a violation of this subsection may not be more than \$10,000.

4. Violations.

5. Considerations. In setting a penalty, the court shall consider, but shall not be limited to, the following:

A. Prior violations by the same party;

B. The degree of environmental damage that cannot be abated or corrected;

C. The extent to which the violation continued following an order of the commissioner or board to correct it; and

D. The importance of setting a civil penalty substantial enough to deter others from similar violations.

6. Maximum penalties. The maximum civil penalty may exceed \$10,000 for each day of that violation, but may not exceed \$25,000 for each day of the violation, when it can be shown that there has been a previous violation of the same law by the same party within the 5 preceding years, and the maximum criminal penalty may exceed \$25,000 for each day of violation, but may not exceed twice the amounts in subsection 1, when it can be shown that there has been a previous violation of the same law by the same party.

7. Notification. The commissioner shall notify all newspapers of general circulation in the State of all administrative consent agreements, court-ordered consent decrees and adjudicated violations involving laws administered by the department.

8. Economic benefit. If the economic benefit resulting from the violation exceeds the applicable penalties under subsection 2, the maximum civil penalties may be increased for each day of the violation. The maximum civil penalty may not exceed an amount equal to twice the economic benefit resulting from the violation. The court shall consider as economic benefit, without limitation, the costs avoided or enhanced value accrued at the time of the violation by the violator not complying with the applicable legal requirements.

9. Unavoidable malfunctions. The following considerations apply to violations resulting from unavoidable malfunctions.

A. The commissioner may exempt from civil penalty an air emission in excess of license limitations if the emission occurs during start-up or shutdown or results exclusively from an unavoidable malfunction entirely beyond the control of the licensee and the licensee has taken all reasonable steps to minimize or prevent any emission and takes corrective action as soon as possible. There may be no exemption if the malfunction is caused, entirely or in part, by poor maintenance, careless operation, poor design or any other reasonably preventable condition or preventable equipment breakdown. The burden of proof is on the licensee seeking the exemption under this subsection. In the event of an unavoidable malfunction, the licensee must notify the commissioner in writing within 48 hours and submit a written report, together with any exemption requests, to the department on a quarterly basis.

B. An affirmative defense is established for a wastewater discharge in excess of license limitations if the discharge results exclusively from unintentional and temporary noncompliance with technology-based limitations because of factors entirely beyond the reasonable control of the licensee and the licensee has taken all reasonable steps to minimize or prevent any discharge and takes corrective action as soon as possible. There is not an affirmative defense if the malfunction is caused, entirely or in part, by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance or careless or improper operation. The burden of proof is on the licensee seeking the affirmative defense under this subsection. In the event of an unavoidable malfunction, the licensee must notify the commissioner orally within 24 hours, and in writing within 5 days.

§349-A. Mining rules

The ~~board~~ department and the Maine Land Use Regulation Commission shall jointly adopt or amend rules necessary to regulate nonferrous metal mining by February 1, 1991. The commissioner and the Maine Land Use Regulation Commission shall convene a joint task force composed of 3 members from each agency to carry out the duties of this section. Any consultants hired must be jointly chosen by both the commissioner and the Director of the Maine Land Use Regulation Commission. Any rules adopted pursuant to this section must include reclamation requirements for a nonferrous metal mining site.

~~[ADD: TRANSITION SECTION]~~

~~[ADD: EFFECTIVE DATE SECTION]~~

Restriction on nullification of final permit

Sec. 1. 30-A MRSA §3007, sub-§6 is enacted to read:

6. : A municipality may not nullify or amend a municipal land use permit or municipal land use permit application by a subsequent enactment, amendment or repeal of a local ordinance after the first to occur of the following:

A. Passage of the seventy-fifth day following the submission of a completed application for

a municipal land use permit for a project that would be impacted by the enactment, amendment or repeal of the local ordinance; or

B. The date on which either the municipal land use permit, or an application for the municipal land use permit, for a project that would be impacted by the enactment, amendment or repeal of the local ordinance has received its lawful final approval by the municipality.

For the purposes of this subsection, "municipal land use permit" includes a municipal building permit, zoning permit, subdivision approval and site plan approval. This subsection does not alter or invalidate any provision of a municipal ordinance that provides for the expiration or lapse of a permit or approval granted pursuant to that permit following the expiration of a certain period of time.

Sound Science and Clarity of Language

38 M.R.S.A. § ____ is enacted to read as follows:

The department is directed to adopt a rule requiring that all departmental rules be predicated on sound science and clarity of language. Sound science is based on studies and findings that are peer-reviewed, include defined terms, utilize analytical techniques that exclude or qualify background measurements, provide references and citations, are free of bias in data collection methods, avoid reliance on limited observations or anecdotes, project real-life as well as worst-case scenarios, and include statistical analysis and risk analysis. Clarity of language is that which is concise, plainly comprehensible and easily accessible

Regulatory Impact Analysis

38 M.R.S.A. § ____ is enacted to read as follows:

All environmental rulemakings proposed by the department shall include a Regulatory Impact Analysis describing the need for and benefits of such rulemaking and identifying and describing all potential costs, reporting requirements and duplicative efforts the rulemaking may impose upon persons subject to the rule. Each regulatory impact analysis shall contain:

(a) Authority. A statement of the statutory authority for the rule.

(b) Needs and benefits. A statement setting forth the purpose of, necessity for, and benefits derived from the rule, a citation for and summary of each study, report or analysis that served as the basis for the rule, and an explanation of how it was used to determine the necessity for and benefits derived from the rule.

(c) Costs. A statement detailing the projected costs of the rule, which shall indicate:

(i) the costs for the implementation of, and continuing compliance with, the rule to regulated persons;

- (ii) the costs for the implementation of, and continued administration of, the rule to the department and to the state and its local governments; and
- (iii) the information, including the source or sources of such information, and methodology upon which the cost analysis is based; or
- (iv) where the department finds that it cannot fully provide a statement of such costs, a statement setting forth its best estimate, which shall indicate the information and methodology upon which such best estimate is based and the reason or reasons why a complete cost statement cannot be provided.
- (d) Paperwork. A statement describing the need for any reporting requirements, including forms and other paperwork, which would be required as a result of the rule and the estimated time necessary to complete and submit the paperwork in accordance with the rule.
- (e) Local government mandates. A statement describing any program, service, duty or responsibility imposed by the rule upon any county, city, town, village, school district, or other special district.
- (f) Duplication. A statement identifying other existing rules and other legal requirements of the state and federal governments related to the proposed rulemaking, including those which may duplicate, overlap or conflict with the rule. If the statement indicates that the rule would duplicate, overlap or conflict with any other relevant rule or legal requirement, the statement should also identify all efforts that the department has or will undertake to resolve, or minimize the impact of, such duplication, overlap or conflict on regulated persons, including, but not limited to, seeking waivers of or exemptions from such other rules or legal requirements, seeking amendment of such other rules or legal requirements, or entering into a memorandum of understanding or other agreement concerning such other rules or legal requirements.
- (g) Alternative approaches. A statement indicating whether any significant alternatives to the rule were considered by the department, including a discussion of such alternatives and the reasons why they were not incorporated into the rule.
- (h) Federal standards. A statement identifying whether the rule exceeds any minimum standards of the federal government for the same or similar subject areas and, if so, an explanation of why the rule exceeds such standards.
- (i) Compliance schedule. A statement indicating the estimated period of time necessary to enable regulated persons to achieve compliance with the rule.

Beneficial Reuse of Hazardous and Solid Wastes

38 M.R.S.A. § ____ is enacted to read as follows:

The department shall adopt rules to allow and encourage, to the maximum extent possible consistent with the protection of public health and the environment, the beneficial reuse of hazardous and solid wastes, in order to preserve resources, conserve energy and reduce the need to dispose of such wastes. In developing rules, the department shall amend existing regulations and adopt any such new regulations in such a manner that makes those regulations consistent with, at a minimum, the federal regulations governing transfer, management, reclamation and reuse of hazardous and solid wastes. The department shall also annually review methods of

beneficially managing, reclaiming and reusing hazardous and solid wastes that are approved by other states and incorporate those methods to the extent that the department determines is advisable.

Statute of limitations for filing suit for environmental violations based on the federal statute of limitations.

38 M.R.S.A. § 347-A(8) is amended to read as follows:

8. Limitations ~~on air and wastewater discharge of~~ enforcement actions. The following limitations apply to air and wastewater discharge enforcement actions:

- A. ~~If a licensee has reported to the department a violation of chapter 4 or of rules adopted under chapter 4, a~~ An enforcement action for civil or administrative penalties may in no event be brought by the department commissioner or the Attorney General for that a violation must be initiated within after 10 6 years of the date the department or the Attorney general discovers the act or omission giving rise to the violation or violations. licensee reported the violation to the department.
- B. ~~If a licensee has reported to the department a violation of chapter 3, subchapter 1, article 2 or of rules adopted under chapter 3, subchapter 1, article 2, an enforcement action for civil or administrative penalties brought by the department or the Attorney General for that violation must be initiated within 10 years of the date the licensee reported the violation to the department.~~

Require Notices of Violation ("NOV") to be issued by DEP within 30 days of an observed violation.

38 M.R.S.A. § 347-A(1)(C) is enacted to read as follows:

- C. A notice of violation must be issued within 30 days after the commissioner discovers the act or omission giving rise to the alleged violation or violations. The failure to timely issue a notice of violation shall be considered a mitigating factor in connection with any action for civil or administrative penalties brought by the commissioner or the Attorney General.

38 M.R.S.A. § 349(2) is amended to read as follows:

- 2. Civil penalties. Except as otherwise specifically provided, a person who violates a law administered by the department, including, without limitation, a violation of the terms or conditions of an order, rule, license, permit, approval or decision of the board or commissioner, or who disposes of more than 500 pounds or more than 100 cubic feet of litter for a commercial purpose, in violation of Title 17, section 2265-A, is subject to a civil penalty, payable to the State, of ~~not less than \$100 and not more~~

than \$10,000 for each day of that violation or, if the violation relates to hazardous waste, of not more than \$25,000 for each day of the violation. This penalty is recoverable in a civil action.

Adopt an environmental audit law or policy, identical to the version used by the federal EPA. This forgives gravity-based penalties for discovery of non-compliance during a compliance assessment or part of an environmental management program when the problem is promptly disclosed and corrected.

38 M.R.S.A. § 349(10) is enacted to read as follows:

10. **Environmental Audit Policy.** The purpose of this section is to safeguard human health and the environment by providing major incentives for regulated persons to voluntarily come into compliance with state environmental laws and regulations. Any person has 21 days from the discovery that a violation has, or may have, occurred to disclose the violation in writing to the commissioner. Discovery is when any officer, director, employee or agent employed by or under contract with the facility has an objectively reasonable basis for believing that a violation has, or may have occurred. The disclosure should at a minimum identify the means of discovery, type of violation, and facility location. The commissioner may request further information about the violation to process the submission.

Persons that satisfy the following conditions shall be exempt from liability for penalties in a civil or criminal enforcement action brought by the commissioner or the Attorney General. Persons that satisfy (B) through (I) of the following conditions shall receive a 75% penalty reduction of the otherwise applicable penalty and a recommendation for no criminal prosecution of the violations against the person.

- A. Systematic discovery of the violation through an environmental audit or the implementation of a compliance management system;
- B. Voluntary discovery of the violation such that the violation was not detected as a result of a legally required monitoring, sampling or auditing procedure;
- C. Prompt disclosure in writing to the commissioner within 21 days of discovery or such shorter time as may be required by law;
- D. Independent discovery and disclosure before the commissioner or another regulator would likely have identified the violation through its own investigation or based on information provided by a third-party;
- E. Correction and remediation within 60 days or as expeditiously as possible from the date of discovery;
- F. Prevent recurrence of the violation;
- G. Repeat violations are ineligible. The specific or closely related violations may not have occurred at the same facility within the past 3 years or those that have occurred as part of a pattern at multiple facilities owned or operated by the same entity within the past 5 years; if the facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion;

- H. Violations that result in serious actual harm to human health and the environment and those that violate the specific terms of an administrative or judicial order or consent agreement are ineligible; and
- I. Cooperation by the disclosing entity is required.

It is the intent of the Legislature that in construing this section the commissioner and the courts will be guided by the United States Environmental Protection Agency's "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Notice," published in the Federal Register on April 11, 2000, as from time to time amended, and interpretations by the Agency thereunder, except to the extent this statute conflicts, in which case this statute will control.

Review the Site Location of Development Act ("SLODA") and the Natural Resources Protection Act ("NRPA") and implementing regulations to modify applicability thresholds and to set objective standards for review of applications.

§344-B. Timetables for processing permit applications

Pursuant to the provisions of this section, the commissioner shall determine and annually publish a processing time for each type of permit or license issued by the department. When establishing processing times for permits or licenses, the commissioner shall take into consideration all duties and responsibilities of the department and the availability of resources.

The provisions of this section apply only to new permit and license applications.

1. Publication of timetables. Following consultation with the advisory committee pursuant to section 2, by May 1, 2011, the commissioner shall review the current permit and license application processing timetables and adopt as a rule application processing timetables that reduce the timeframe for permit application review and decision to the maximum extent practicable. No later than November 1st of each year, the commissioner shall propose amendments to the rule regarding processing timetables for each type of permit and license issued by the department. The permit and license processing timetables adopted each year must be published simultaneously in all newspapers designated by the Secretary of State as papers of record under Title 5, section 8053, subsection 5. Rules promulgated under this section shall be major substantive rules.

Except as provided in this section, the deadline governing the processing of an application is determined by the timetable in effect on the date the application is determined to be complete.

38 MRSA §342(10) is amended to read as follows:

10. Consultants. The commissioner may contract with or otherwise employ consultants for services necessary to carry out duties under this Title; provided, however, that this authority does not extend to the contracting with or employment of consultants for the purpose of third-party inspections or third-party oversight. The commissioner shall not require, as a condition of any permit or order, the contracting with or employment of consultants as a third party inspector or for third-party oversight

Eliminate DEP review if there is adequate review at the municipal level.

38 M.R.S.A. §489-A(1) is amended to read as follows:

1. Kinds of projects. The following kinds of projects may be reviewed by registered municipalities pursuant to this section:

A. Subdivisions as defined in section 482, subsection 5 ~~of more than 20 acres but less than 100 acres~~ which are less than 200 acres; or

H. Structures as described defined in subsection 6 ~~in excess of 3 acres but less than 7 acres~~ which are less than 20 acres.

- ii. 38 M.R.S.A. §480-F provides the authority for municipalities to issue permits under the NRPA. Subsection 2, Procedure, gives the DEP 30 days to review and disapprove the permit. I recommend Subsection 2 be rewritten as follows:

38 M.R.S.A. 480-F subsection 2 is amended to read as follows:

2. Procedure. The following procedures apply to applications under this article processed by municipalities.

A. For applications processed by municipalities except those described in chapter 305 of the department's rules, ~~no permit issued by a municipality may become effective until 30 days subsequent to its receipt by the commissioner, but if approved by the department in less than 30 days, the effective date is the date of approval. A~~ a copy of the application for the permit and the permit issued by the municipality must be sent to the commissioner, within one week, by registered mail. ~~The department shall review that permit and either approve, deny or modify it as necessary. If the department does not act within 30 days of its receipt of the permit by the municipality, this constitutes the approval and the permit is effective as issued, except that within this 30-day period the department may extend the time for its review by an additional 30 days.~~

B. For those applications for approval of activities described in chapter 305 of the department's rules, a copy of the municipality's action to approve or deny an application must be sent to the commissioner within 14 days of the municipality's decision.

Requirements for Construction in Sand Dunes

38 MRSA §480-Q, sub-§2, ¶D, as repealed and replaced by PL 1995, c. 27, §1, is amended to read:

D. TheFor a structure located in a coastal sand dune system, the square footage of the repaired structure does not exceed the square footage of the structure as it existed 24 months prior to the repair. For a structure not located in a coastal sand dune system, the dimensions of the repaired structure do not exceed the dimensions of the structure as it existed 24 months prior to the repair, or if the structure has been officially included in or is considered by the Maine Historical Preservation Commission eligible for listing in the National Register of Historic Places, the dimensions of the repaired structure do not exceed the dimensions of the historic structure.

38 MRSA §480-B, sub-§5-B is enacted to read:

5-B. Impervious area. "Impervious area" means an area that is covered by development, including, but not limited to, a building, deck, parking lot, roadway or other similar construction.

38 MRSA §480-Q, sub-§28, as enacted by PL 2009, c. 75, §4, is amended to read:

28. Release of water from dam after petition by owner for release from dam ownership or water level maintenance. Activity associated with the release of water from a dam pursuant to an order issued by the department pursuant to section 905; and

38 MRSA §480-Q, sub-§29, as enacted by PL 2009, c. 75, §5, is amended to read:

29. Dam safety order. Activity associated with the breach or removal of a dam pursuant to an order issued by the Commissioner of Defense, Veterans and Emergency Management under Title 37B, chapter 24; and

38 MRSA §480-Q, sub-§30 is enacted to read:

30. Impervious area. Modification of an existing residential or commercial structure in a coastal structure in a coastal sand dune system if:

A. The modification is contained within an impervious area; and

B. The modification is within the height restriction of an applicable law or ordinance.

Extend the manufacturing exemption in 38 M.R.S.A. §488(7) to other types of facilities.

38 M.R.S.A. §488(7) is amended to read as follows:

7. Exemption for expansion at existing manufacturing facility; and commercial or industrial structures.

New construction at a licensed manufacturing facility or commercial structure or industrial structure is exempt from review under this article provided that the additional disturbed area not to be revegetated does not exceed ~~30,000~~ 45,000 square feet in any calendar year and does not exceed ~~60,000~~ 120,000 square feet ground area in total. When review under this article is required at a licensed manufacturing facility; or commercial structure or industrial structure, the applicant shall provide plans for the new development, as well as for those activities that have been undertaken pursuant to this subsection. The permitter shall annually notify the department of new construction conducted during the previous 12 months pursuant to this exemption. The notice must identify the type, location, and ground area of the new construction.

Align Site Law Standards with NRPA

38 M.R.S.A. §484(3) is repealed and the following enacted in its place:

(3.) No undue adverse effect on the natural environment. The developer has demonstrated the following:

A. Air quality. The development complies with applicable air quality requirements.

B. Water quality. The development complies with applicable water quality requirements for surface water and ground water, and further that there is no undue adverse impact on ground water quality.

C. Noise. The proposed development complies with the applicable noise regulations.

i. Noise from a residential development approved under this article may not be regulated under this subsection, and noise generated between the hours of 7 a.m. and 7 p.m. or during daylight hours, whichever is longer, by construction of a development approved under this article may not be regulated under this subsection.

ii. In determining whether a developer has made adequate provision for the control of noise generated by a commercial or industrial development, the department shall consider the department's rules relating to noise and the

quantifiable noise standards of the municipality in which the development is located and of any municipality that may be affected by the noise.

iii. Nothing in this subsection may be construed to prohibit a municipality from adopting noise regulations stricter than those adopted by the department.

D. Significant historic sites. The proposed development has no undue adverse impact on a historic site. For the purposes of this article, a historic site is one which has been officially included on the National Register of Historic Places and/or the Maine Historic Resource Inventory or has been identified by the Maine Historic Preservation Commission as having significant historic value.

E. Existing uses and scenic character. The proposed development satisfies the requirements in Title 38, Chapter 3, Article 5-A, Section 480-D(1) and implementing regulations.

F. Fisheries, wildlife and flora. The proposed development has no undue adverse impact on regional populations of aquatic life, wildlife and flora and, as applicable, satisfies the requirements in Title 38, Chapter 3, Article 5-A, Section 480-D(3).

G. Wind energy development. In making a determination under this subsection regarding an expedited wind energy development as defined in Title 35-A, Section 3451, Subsection 4, or an offshore wind power project with an aggregate generating capacity of 3 megawatts or more, the department shall consider the development's or project's effects on scenic character and existing uses related to scenic character in accordance with Title 35-A, Section 3452.

Create minor projects permitting process for added projects to revisions to large projects that have already been approved under Site Law to reduce administrative burden of these smaller initiatives.

38 M.R.S.A. §484-A is enacted to read:

484-A. The department shall develop and implement rules to process applications for minor amendments or revisions to developments licensed under the Site Law.

**Increase the minimum size requirement and minimum subdivided lots requirements of
a development or facility to trigger this regulation**

38 MRSA §482, sub-§5, as amended by PL 1997, c. 603, §2, is further amended to read:

5. Subdivision. A "subdivision" is the division of a parcel of land into 510 or more lots to be offered for sale or lease to the general public during any 5year period, if the aggregate land area includes more than 2040 acres; except that when all lots are for single-family, detached, residential housing, common areas or open space a "subdivision" is the division of a parcel of land into 1530 or more lots to be offered for sale or-lease to the general public within any 5year period, if the aggregate land area includes more than 3060 acres. The aggregate land area includes lots to be offered together with the roads, common areas, easement areas and all portions of the parcel of land in which rights or interests, whether express or implied, are to be offered. This definition of "subdivision" is subject to the following exceptions:

C. Lots of 40 or more acres ~~but not more than 500 acres~~ may not be counted as lots ~~except where:~~

~~(1) The proposed subdivision is located wholly or partly within the shoreland zone;~~

~~€...1. Lots of more than 500 acres in size may not be counted as lots;~~

D. Five years after a subdivider establishes a single-family residence for that subdivider's own use on a parcel and actually uses all or part of the parcel for that purpose during that period, a lot containing that residence may not be counted as a lot;

E. Unless intended to circumvent this article, the following transactions may not be considered lots offered for sale or lease to the general public:

(1) Sale or lease of lots to an abutting owner or to a spouse, child, parent, grandparent or sibling of the developer if those lots are not further divided or transferred to a person not so related to the developer within a 5year period, except as provided in this subsection;

(2) Personal, nonprofit transactions, such as the transfer of lots by gift, if those lots are not further divided or transferred within a 5year period or the transfer of lots by devise or inheritance; or

(3) Grant of a bona fide security interest in the whole lot or subsequent transfer of the whole lot by the original holder of the bona fide security interest or that person's successor in interest;

F. In those subdivisions that would otherwise not require site location approval, unless intended to circumvent this article, the following transactions may not, except as provided, be considered lots offered for sale or lease to the general public:

(1) Sale or lease of common lots created with a conservation easement as defined in Title 33, section 476, ~~provided that~~ as long as the department is made a party; and

H. The transfer of contiguous land by a permit holder to the owner of a lot within a permitted subdivision is exempt from review under this article, ~~provided that~~ as long as the land was not owned by the permit holder at the time the department approved the subdivision. Further division of the transferred land must be reviewed under this article.

The exception described in paragraph F does not apply, and the subdivision requires site location approval, whenever the use of a lot described in paragraph F changes or the lot is offered for sale or lease to the general public without the limitations set forth in paragraph F. For the purposes of this subsection only, a parcel of land is defined as all contiguous land in the same ownership provided that lands located on opposite sides of a public or private road are considered each a separate parcel of land unless that road was established by the owner of land on both sides of the road subsequent to January 1, 1970. A lot to be offered for sale or lease to the general public is counted, for purposes of determining jurisdiction, from the time a municipal subdivision plan showing that lot is recorded or the lot is sold or leased, whichever occurs first, until 5 years after that recording, sale or lease.

38 MRSA §482, sub-§6, as amended by PL 1993, c. 383, §18 and affected by §42, is further amended to read:

6. Structure. A "structure" means:

B. Buildings, parking lots, roads, paved areas, wharves or areas to be stripped or graded and not to be revegetated that cause a total project to occupy a ground area in excess of 310 acres. Stripped or graded areas that are not revegetated within a calendar year are included in calculating the ~~3-acre~~ 10 acre threshold.